No. 89-788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

VENUS INDEPENDENT SCHOOL DISTRICT,
GRANDVIEW INDEPENDENT SCHOOL DISTRICT,
and JOHNSON COUNTY SPECIAL EDUCATION COOPERATIVE,
Petitioners,

v.

SHELLY C., b/n/f
MR. AND MRS. SHELBIE C.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May attorney's fees be awarded under the Handicapped Children's Protection Act, 20 U.S.C. §1415(e)(4)(B), after a parent requests a due process hearing and settlement/final resolution is reached prior to convening an administrative hearing?

LISTING OF PARTIES

Venus Independent School District - Defendants/ Appellants/Petitioners

Grandview Independent School District - Defendants/ Appellants/Petitioners

Johnson County Special Education Cooperative - Defendants/Appellants/Petitioners

Shelley C., b/n/f Mr. and Mrs. Shelbie C. - Plaintiffs/ Appellees/Respondents

Texas Association of School Boards - Amicus Curiae

Martha C. Wright of Wright & Associates, P.C. - Attorney for Defendants/Appellants/ Petitioners

Mark S. Partin of Advocacy, Incorporated - Attorney for Plaintiffs/Appellees/Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

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STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was made and entered on August 2, 1989. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

A. Nature of the Case

Shelley C., Respondent in this action, concurs with Petitioners', Venus Independent School District (hereinafter "Venus ISD"), the Grandview Independent School District (hereinafter "Grandview ISD") and the Johnson County Special Education Cooperative (hereinafter "Coop"), statement of the Nature of the Case except as follows:

This is an action for the recovery of an award of a reasonable attorneys' fee brought under the Handicapped Children's Protection Act, 20 U.S.C. §1415(e)(4)(B), for hours expended in achieving a settlement of the substantive issues while pursuing administrative remedies.

Shelley C. filed a Request for a Due Process Hearing on September 8, 1986. The hours expended in settlement negotiations occurred *after* the initiation of the administrative proceedings as provided by Section 1415 of the Education of the Handicapped Act (EHA). Final resolution of the issues pending before the Special Education Hearing Officer for the State of Texas was obtained after a Prehearing Conference and prior to the convening of a hearing on the merits.

B. Statement of Facts

Shelley C., asserts that Respondents' Statement of Facts is unduly argumentative and contains a number of assertions that are irrelevant to the Question Presented for Review. Specifically, the chronology of events and their factual accuracy and significance have not been established and have no bearing on the Question Presented for Review. The Fifth Circuit Court

of Appeals remanded this action to the District Court to resolve these evidentiary conflicts, as well as to determine the reasonableness of the attorneys' fees.

Shelley C. attempted to resolve the issue of recovering a reasonable attorneys' fee for time expended in pursuing administrative proceedings without resort to further litigation. When informal attempts to recover attorneys' fees failed, Shelley C. filed an action in federal district court for recovery of reasonable attorneys' fees and costs. The Venus ISD filed a Motion to Dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. On May 12, 1988, the district court denied their Motion to Dismiss, concluding that negotiations prior to a hearing constitute "proceedings" under the EHA. The parties filed Cross-Motions for Summary Judgment based on a Stipulated Statement of Facts, and on December 15, 1988, the district court granted Shelley C.'s Motion for Summary Judgment, denied Venus ISD, Grandview ISD and the Coop's Motion for Summary Judgment, and awarded reasonable attorneys' fees and costs in the amount of $30,533.62.

On January 11, 1989, the Venus ISD, the Grandview ISD and the Coop appealed the granting of summary judgment to the Fifth Circuit Court of Appeals. The Petitioners were *successful* in obtaining a ruling from the Fifth Circuit Court of Appeals overturning the district court's granting of Shelley C.'s Motion for Summary Judgment. The Fifth Circuit Court of Appeals remanded the cause to the district court to determine prevailing party status and the reasonableness of an award of attorneys' fees. The Fifth Circuit Court of Appeals held that an award of

attorneys' fees for hours expended in settlement negotiations was consistent with the Handicapped Children's Protection Act. After their success at the Fifth Circuit Court of Appeals, the Venus ISD, the Grandview ISD and the Coop have filed a Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Shelley C. asserts that an award of attorneys' fees for time expended in negotiating final resolutions of issues pending before a hearing officer prior to the time that a hearing on the merits is convened is allowed under the Handicapped Children Protection Act and is consistent with Congressional intent. Shelley C. asserts that the Fifth Circuit Court of Appeals is correct in ruling that settlement negotiations are proceedings under the Handicapped Children's Protection Act. Shelley C. asserts that an award of attorneys' fees for hours expended during administrative proceedings is allowed under the Handicapped Children's Protection Act. Shelley C. asserts that all Circuit Courts of Appeal that have addressed the issue of awarding attorneys' fees for hours expended pursing administrative remedies have agreed that an award is available.

Shelley C. asserts that Respondents' reliance on the panel decision of the D.C. Circuit Court of Appeals in *Lani Moore v. District of Columbia*, 886 F.2d 335 (D.C. Cir. 1989), is without basis as that decision was *vacated* when the court granted a motion for rehearing *en banc*. The D.C. Circuit Court of Appeals has scheduled the *Lani Moore* appeal for rehearing on May 9, 1990.

ARGUMENT

THE COURT OF APPEALS IS CORRECT IN RULING THAT ATTORNEYS' FEES MAY BE AWARDED AFTER INITIATION OF ADMINISTRATIVE PROCEEDINGS WHEN SETTLEMENT IS REACHED PRIOR TO A HEARING ON THE MERITS.

A. THE FEES WERE INCURRED IN SETTLEMENT NEGOTIATIONS AFTER INITIATION OF THE MANDATORY ADMINISTRATIVE PROCEEDINGS AND PRIOR TO CONVENING A HEARING ON THE MERITS.

Shelley C. filed an application for costs and attorneys' fees under the Handicapped Children's Protection Act (HCPA), 20 U.S.C. §1415(e)(4)(B), after obtaining the relief sought through initiation of the mandatory administrative proceedings by settlement prior to convening a hearing on the merits. The HCPA grants the district court the discretion to award a reasonable attorneys' fee for hours expended in any action or proceeding brought under this subsection. Shelley C. filed a Request for a Due Process Hearing on September 8, 1986. The Hearing Officer convened a Prehearing Conference on October 3, 1986. After four months of negotiations, on February 17, 1987, the parties were able to resolve the issues pending before the Hearing Officer without resort to a hearing on the merits. After failing to reach agreement on the payment of a reasonable attorneys' fee, Shelley C. filed an action in federal district court on February 24, 1988.

The Fifth Circuit Court of Appeals is correct in ruling that the HCPA allows the district court to award attorneys' fees for hours expended negotiating a settlement of the issues pending before the Hearing Officer. The language of the HCPA shows that an

award of attorneys' fees is anticipated. Section 1415(e)(4)(D) provides for the reduction of the amount of fees awarded for hours expended negotiating a settlement under certain circumstances. The HCPA states that

> No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian if—
>
> (i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, *in the case of an administrative proceeding*, at any time more than ten days before the proceeding begins;
>
> (ii) the offer is not accepted within ten days; and
>
> (iii) the court or *administrative officer* finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

20 U.S.C. §1415(e)(4)(D) (emphasis added).

If Congress had intended that no fees be allowed for hours expended at the mandatory administrative level when settlement is reached, then they would not have enacted a process for determining when such an award of fees is inappropriate. Congress clearly stated their preference for settlement in §1415(e)(4)(D). That section, as discussed above, contains a three-step process for making a determination on when the court

or administrative officer can limit the award of attorneys' fees after a written offer of settlement has been made. The court *or administrative officer* must determine that the written offer of settlement was made at least ten days prior to the proceedings, that the offer was not accepted within ten days, and that the relief finally obtained by Shelley C. was not more favorable than that contained in the offer of settlement. Once the court *or administrative officer* has made a determination on all three of these issues, the court *or administrative officer* can limit an award of fees to the time expended prior to the written offer of settlement. Congress intended the courts to award fees for time expended prior to the hearing; otherwise, §1415(e)(4)(D), as it relates to the mandatory administrative proceedings, is rendered meaningless. Shelley C. asserts that the Fifth Circuit Court of Appeals' application of this section allowing the district court to award attorneys' fees for time expended pursuing administrative remedies is correct.

Shelley C. asserts than an award of attorneys' fees for time expended in negotiating the final resolution of issues pending before a hearing officer prior to the time that a due process hearing is convened is allowed under the HCPA and consistent with Congressional intent. Shelley C. further asserts that, in addition to mandating an award of attorneys' fees, the HCPA authorizes a separate suit to be brought for those fees when they are incurred in the successful pursuit of administrative remedies.

Six of the Circuit Court of Appeals have addressed this issue and all have agreed that the HCPA grants discretion to the district court to award fees for hours expended pursuing mandatory administrative pro-

ceedings. *See, Counsel v. Dow*, 849 F.2d 731 (2nd Cir. 1988), *cert. denied*, 109 S.Ct. 391 (1988); *Arons v. New Jersey State Board of Education*, 842 F.2d 58 (3rd Cir. 1988); *Duane M. v. Orleans Parish School Board*, 861 F.2d 115 (5th Cir. 1988); *Eggers v. Bullitt County School District*, 854 F.2d 892 (6th Cir. 1988); *McSomebodies (No. 1) v. Burlingame Elementary School District*, 886 F.2d 1558 (9th Cir. 1989); *McSomebodies (No. 2) v. San Mateo City School District*, 886 F.2d 1559 (9th Cir. 1989); *Mitten v. Muskogee County School District*, 877 F.2d 932 (11th Cir. 1989).

Petitioners rely on *North Carolina Department of Public Transportation v. Crest Street*, 479 U.S. 6 (1986), where the court held that no separate federal action could be brought to recover attorneys' fees under 42 U.S.C. §1988. The *Crest Street* decision was rendered *after* the enactment of the HCPA. The Petitioners argue that *Crest Street* indicates that a parent may not maintain an action solely for the recovery of attorneys' fees. Shelley C. asserts that *Crest Street* rejected certain dicta in *Gaslight Club v. Carey*, 447 U.S. 54 (1980), to which Congress favorably referred in discussing the effect of §1415(e)(4)(B) on awards of fees for hours spent at the administrative level.

Shelley C. asserts that the Petitioners reliance on *Crest Street* is misplaced for several reasons. First, the statutory language of the two attorneys' fees provisions differs in that the wording of §1415(e)(4)(B) is less narrow than that of §1988. Section 1415(e)(4)(B) refers to "any action or proceeding brought under this subsection" while §1988 refers to "any action or proceeding to enforce a provision of §§1981, 1982,

1983 . . . ." Second, unlike the legislative history of §1988, the legislative history of §1415(e)(4)(B) indicates Congressional intent that attorneys' fees incurred at the administrative level may be recovered in an independent action. Third, Congress clearly adopted the view that the dicta of *Carey*, which indicated that one could sue under Title VII solely for an award of attorneys' fees for legal work done in state and local proceedings, was the position that Congress intended for the operation of §1415(e) notwithstanding the later decision in *Crest Street*. See, H.R. Rep. 99-296, 99th Cong. 1st Sess. 5 (Oct. 2, 1985); S.Rep. No. 99-112, 99th Cong., 2d Sess. 14; 131 CONG. REC. S10400 (July 30, 1985) (remarks of Sen. Simon).

Additionally, §1415 does not restrict the award of attorneys' fees only to suits brought to enforce rights created by the Education of the Handicapped Act. This is evidenced by the fact that the HCPA specifically refers to potential restrictions on attorney fee awards for work done in administrative proceedings. As previously stated herein, §1415(e)(4)(D) limits an award of attorneys' fees in any "action or proceeding" when, in the case of an administrative proceeding, the local educational authority made an offer of settlement more favorable than the final ruling within ten days of that proceeding's commencement to hours expended prior to the offer of settlement.

In *Duane M.*, the Fifth Circuit Court of Appeals gave an exhaustive review of the legislative history of the HCPA and stated that "Members of both Houses of Congress expressed similar reasons for awarding attorneys fees for legal representation at the administrative level." *Duane M.* at 120. In *Duane*

M., the court also relied on the Sixth Circuit's opinion in *Eggers*, where the court gave an exhaustive review of the legislative history of the HCPA. The legislative history clearly establishes that Congress intended to authorize the courts to award a reasonable attorneys' fee for time expended pursuing administrative remedies. In *Duane M.*, at 117 n. 2, the Court listed the cases that have addressed the issue of whether a parent may bring a separate suit for attorneys' fees. Shelley C. asserts that she has the right to bring a suit solely for the purpose of obtaining attorneys' fees when final resolution was obtained prior to the convening of the due process hearing.

Petitioners assert, at pp. 6-7 of their Writ of Certiorari, that there are no cases to support the Fifth Circuit Court of Appeals' decision to award fees for time expended resolving the issues pending before the hearing officer prior to convening a hearing on the merits. Shelley C. asserts the opposite. In *Robert H. v. Fort Worth Independent School District*, EHLR DEC. 559:509 (N.D.Tx. June 1, 1988), the court determined that the plaintiff had prevailed by obtaining a pre-hearing settlement and awarded attorneys' fees and costs. In *Rossi v. Gosling*, 696 F.Supp 1079 (E.D. VA. 1988), the court determined that the plaintiff had prevailed by obtaining a pre-hearing settlement and awarded reasonable attorneys' fees and costs. In *Anderson v. Syracuse*, Cause No. 88-CV-122 (N.D. N.Y. February 3, 1989) [available on WestLaw] 1989 WL 8664, the court ruled that the plaintiff had prevailed by obtaining a pre-hearing settlement and awarded a reasonable attorneys' fees and costs. Shelley C. asserts that the Fifth Circuit Court of Appeals' decision that a district court has the discretion to award fees

and costs for time expended pursuing administrative remedies prior to convening a hearing are covered by the HCPA is correct.

B. LANI MOORE V. DISTRICT OF COLUMBIA

Petitioners assert that there is a conflict among the Circuit Courts and cite *Lani Moore v. District of Columbia*, 886 F.2d 335 (D.C. Cir. 1989), in support of this assertion. Shelley C. asserts that this decision was vacated when the D.C. Circuit Court of Appeals granted a motion for rehearing *en banc*. *See*, Order scheduling rehearing *en banc* for May 9, 1990. (Appendix A), and the Handbook of Practice and Internal Procedures, Circuit Court of Appeals for the District of Columbia, XIII.B.2, pp. 66-69, August 1, 1987 (Appendix B at 5a).

Shelley C. asserts that no conflict exists among the Circuit Courts and that should a conflict arise as a result of the *en banc* decision of the D.C. Circuit Court of Appeals in *Lani Moore*, plenary review of that decision may be appropriate by the United States Supreme Court.

C. AN AWARD OF ATTORNEYS' FEES FOR HOURS EXPENDED IN PREHEARING SETTLEMENT NEGOTIATIONS IS CONSISTENT WITH THE HCPA AND PUBLIC POLICY.

Petitioners assert that to award fees for time spent prior to a hearing is contrary to public policy. Shelley C. asserts that had Congress intended to preclude an award of attorneys' fees for work performed after a written offer of settlement, they would have clearly stated so; instead, Congress enacted a very specific three-step process in §1415(e)(4)(D) with which Venus ISD failed to comply. By enacting the HCPA, Con-

gress has made clear that it is public policy to award reasonable attorneys' fees and costs to parents or guardians of children with disabilities who prevail in an action brought under the EHA.

Petitioners assert that this court should adopt the reasoning that the district court applied in *Dodds v. Simpson*, EHLR DEC. 559:320 (D.Or. October 26, 1987). In *Dodds*, the district court assumed that it had the discretion to award fees for a prehearing settlement and in exercising that discretion declined to award fees. The *Dodds* decision was decided prior to the Ninth Circuit Court of Appeals decisions in *McSomebodies (No. 1)* and *McSomebodies (No. 2)*, where the court ruled that parents who prevail at the administrative level may bring an action in district court to recover an award of attorneys' fees. Shelley C. asserts that the district court has the discretion to award attorneys' fees and costs incurred at the administrative level and that the Fifth Circuit Court of Appeals is correct in so holding.

CONCLUSION

As a matter of law, Shelley C. is entitled to an award of reasonable attorneys' fees and costs as a prevailing party for hours expended after initiating the mandatory administrative proceedings and reaching settlement prior to convening a hearing on the merits. Further, the Fifth Circuit Court of Appeals was correct in remanding this cause to the district court to further develop the facts and resolve any evidentiary conflicts.

PRAYER FOR RELIEF

FOR THE FOREGOING REASONS, the Petitioners Writ of Certiorari should be denied and the decision

of the Fifth Circuit Court of Appeals should be affirmed. Further, Shelley C. should be awarded reasonable attorneys' fees and costs incurred in responding to this Writ.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
for the District of Columbia Circuit

No. 88-703

September, Term, 1989

CA 87-00941

Lani Moore, et al.
v.
District of Columbia, et al.
Appellants

BEFORE: Wald, Chief Justice; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

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ORDER

Upon consideration of the motions of Senator Tom Harkin, et al. and For Love of Children, Inc. for leave to participate as *amici curiae* on rehearing *en banc* it is

ORDERED, by the Court *en banc*, that the motions are granted and it is

FURTHER ORDERED, by the Court *en banc*, on its own motion, that oral argument in this case will be heard by the Court sitting *en banc* at 10:00 A.M. on Wednesday, May 9, 1990. It is

FURTHER ORDERED, by the Court *en banc*, on its own motion, that appellants and appellees shall

file briefs of no more than forty pages and shall do so on April 2, 1990. *Amici* may file briefs of no more than twenty pages on the same date. The joint appendix shall be filed on April 9, 1990. Thirty copies of each brief and of the joint appendix shall be submitted.

Amici are cautioned that they should coordinate with appellees and with each other so as to avoid duplicate briefing.

Time at oral argument will be governed by a further order.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK
BY:
Robert A. Bonner
Deputy Clerk

APPENDIX B

HANDBOOK OF PRACTICE

and

INTERNAL PROCEDURES

UNITED STATES COURT OF APPEALS

for the

DISTRICT OF COLUMBIA

August 1, 1987

XIII. POST-DECISION PROCEDURES
B. Reconsideration
2. Rehearing En Banc

(See Rule 35, Federal Rules of Appellate Procedure; (.D.C. Cir. Rule 15(a).)

Like petitions for rehearing by a panel, suggestions for rehearing *en banc* are frequently filed but rarely granted. Rule 35(a) of the Federal Rules of Appellate Procedure expressly states that *en banc* hearings are not favored and ordinarily will not be ordered except to secure uniformity of decisions among panels of the Court, or to decide questions of exceptional importance.

The formal requirements for a suggestion for rehearing *en banc* partly duplicate, and partly differ from, those of a petition for rehearing by the panel. The suggestion must be filed within 30 days after entry of the judgment if the United States or a federal agency is a party. It must begin with a section entitled "Concise Statement of Issue and Its Importance" that sets forth why the case is of exceptional importance or cites the decisions with which the panel judgment is claimed to be in conflict. An original and 19 copies must be filed. The suggestion cannot be more than 11 printed pages in length, or 15 typewritten pages; motions to exceed this limitation are rarely granted.

If a party is submitting both a petition for rehearing by the panel, and a suggestion for rehearing *en banc*, the two should be combined in the same document, in which event an original and 19 copies should be filed, and the page limits for the combined pleading are 11 printed or 15 typewritten pages. If the two pleadings are filed separately, they may not, combined, exceed these page limits.

As in the case of petitions for rehearing, the rules do not provide for a response to a suggestion for rehearing *en banc*, absent leave of the Court. If a majority of active judges wish a response, the Clerk will enter an order to that effect. There is no oral argument on the question of whether rehearing *en banc* should be granted.

Unlike a petition for rehearing, a suggestion for rehearing *en banc* filed by itself does not automatically stay issuance of the mandate; counsel must move for a stay.

The Clerk transmits the suggestion for rehearing *en banc* to all members of the original pane, including a senior judge of this Court, or a judge visiting from another court, and to all other active judges of this Court. The Clerk sends a vote sheet and, for non-panel members, copies of any opinions or memoranda issued by the original panel. The judges have seven working days to call for a vote on the suggestion. A vote may be requested by any active judge of the Court, or by any member of the panel. If no judge asks for a vote within that time, and on requests more time to consider the matter, the Clerk will enter an order denying the suggestion.

If a judge calls for a vote on the suggestion for rehearing *en banc*, the Clerk immediately sends to the full Court a new vote sheet. The question now is whether there shall be a rehearing *en banc*. On this question only active judges of the Court may vote, and a majority of all active judges, regardless of recusals or temporary absences, must approve rehearing *en banc* in order for it to be granted. The judges have 10 days within which to vote. On the

seventh day, the Clerk provides a status report to the judges. If a majority vote is not received in the 10-calendar day period, the *en banc* request will be denied.

Occasionally a judge desires more time to consider the *en banc* suggestion and circulates a memorandum to the full Court so indicating. The foregoing procedures are then stayed for a reasonable period to permit the judge to review the case further. Moreover, during the summer when a number of judges may be away from the Court, the Clerk is authorized to relax the time limits.

When rehearing *en banc* is granted, the Clerk enters an order which vacates the judgment and opinion by the original panel, either in whole or in part, as circumstances warrant. This order is circulated to all who subscribe to the Court's opinions. An order granting rehearing *en banc* does not show the names of the judges who dissented, but an order denying rehearing *en banc* does show the names of the judges who voted to grant rehearing *en banc*.

The Court setting *en banc* consists of all active judges, plus any senior judges of the Court who were members of the original panel, and who wish to participate, but not visiting judges from other courts. When the Court sits *en banc* with an even number of judges, and the result is an evenly-divided vote, the Court will affirm the order or judgment under review, regardless of the panel decision, but it may publish the *en banc* Court's divided views.

In the absence of a request from a party, any active judge of the Court, or member of the panel, may suggest that a case re reheard *en banc*. If a majority of the active judges agree, the Court orders rehearing *en banc*.

In addition, a party may move for *en banc* consideration prior to a panel decision. If a party wishes a case to be heard initially *en banc*, counsel ideally should file the suggestion within the first thirty days after docketing, but in

no event than the date on which the appellee's or the respondent's brief is due. A judge also may suggest *en banc* consideration prior to the panel decision; on occasion this has been done by the panel itself.